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No. 90-1610

In the Supreme Court of the United States

OCTOBER TERM, 1990

HWANG JUNG JOO, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly applied *INS* v. *Bagamasbad*, 429 U.S. 24 (1976) (per curiam), in upholding the Board of Immigration Appeals' discretionary denial of petitioner's application for an adjustment of status, while declining to issue an advisory opinion as to whether petitioner met the threshold statutory eligibility requirements for that relief.

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OPINIONS BELOW

The memorandum decision of the court of appeals (Pet. App. 1-4) and the order of the Board of Immigration Appeals (Board) (Pet. App. 5-22) are unreported. The decision of the court of appeals is noted at 923 F.2d 862 (Table).

JURISDICTION

The judgment of the court of appeals was entered on January 18, 1991. The petition for a writ of certiorari was filed on April 17, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a native and citizen of Korea. In August 1984, petitioner terminated his long-term lease on his apartment in Korea, quit his job as a clerk for a newspaper company, and entered the United States. To gain entry, petitioner used a false temporary visitor visa and passport that he had bought illegally for $5,000. In January 1985, petitioner married a lawful permanent resident of the United States who subsequently filed a spousal visa petition on his behalf; the petition was approved by the INS district director. Petitioner then applied for adjustment of status to that of lawful permanent resident alien. Pet. App. 5-8, 16-17.

On June 16, 1986, during petitioner's interview with the INS district director regarding his application, petitioner swore under oath that he had obtained his entry visa from the American Embassy in Korea, and that the visa was valid. After the interview, however, petitioner acknowledged that he had bought the passport and visa used to gain entry, had never lawfully applied for either document, and had fraudulently entered the United States. The next day, the INS served petitioner with an order alleging that he was a deportable alien under 8 U.S.C. 1251 (a)(1) because he was excludable at the time of his entry under 8 U.S.C. 1182(a)(20); the gravamen of the charge was that petitioner had not possessed valid travel documents, but had possessed an invalid passport and visa procured through fraud. Pet. App. 6, 16.

2. a. At his deportation hearings on August 12 and October 28, 1986, petitioner conceded his deportability, but presented testimony in support of applications for a waiver of his excludability pursuant to

Section 212(i) of the Immigration and Nationality Act (Act), 8 U.S.C. 1182(i),[1] and for adjustment of status under Section 245(a), 8 U.S.C. 1255(a).[2] The immigration judge (IJ) found petitioner deportable and denied the relief requested. The IJ concluded that petitioner's fraud in gaining entry to the United States was "egregious to the point where it overrode the hardship to [petitioner's] wife" resulting from his deportation; accordingly, as a matter of discretion, petitioner did not merit the relief he sought. Pet. App. 6, 9.

b. The Board of Immigration Appeals affirmed. Considering first the adjustment-of-status application, the Board noted that petitioner had to establish both that he was eligible for the relief and that he merited a favorable exercise of discretion. Pet. App. 15. The Board then found that petitioner "is not deserving of administrative discretion." *Id.* at 16. The Board stated that "not only did [petitioner] perpetrate a fraud upon entering the United States, but * * * he continued to perpetrate such fraud by attempting to obtain lawful permanent residence in the United States by lying under oath to an officer of the

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[1] Pursuant to Section 212(i), an alien who is the spouse of a permanent resident alien and who is excludable because he procured an entry document by fraud or misrepresentation, or admitted perjury in connection therewith, may be granted a visa and admitted "if the Attorney General in his discretion has consented to the alien's applying * * * for a visa and for admission to the United States." 8 U.S.C. 1182(i).

[2] Section 245 permits "the Attorney General, in his discretion", to adjust the status of an alien to that of an alien lawfully admitted for permanent residence provided the alien applies, establishes his eligibility, and has an immigrant visa immediately available to him. 8 U.S.C. 1255(a).

Immigration and Naturalization Service." *Ibid.* The Board also found petitioner's testimony that he had not intended to settle in the United States before traveling here "unbelievable" and "totally incredible" given his termination of his lease and sale of his possessions before departing from Korea. *Id.* at 16-17. After weighing the factors in petitioner's favor —his marriage, his desire to adopt his stepdaughter, and the impact on his wife—the Board found that the preponderance of negative factors "fully justif[ies]" the IJ's "discretionary denial" of adjustment of status. *Id.* at 17.

Turning to petitioner's application for a waiver of excludability, the Board again weighed the positive and negative equities before concluding that "as a matter of discretion, we will not grant a Section 212 (i) waiver to this [petitioner] due to the pattern of misconduct in which he engaged." Pet. App. 20-21.

3. In an unpublished opinion, the court of appeals denied petitioner's petition for review. Although petitioner challenged the Board's denials of relief under both Sections 212(i) and 245, and offered a series of legal arguments in support of those contentions, the court stated that "[w]e need not decide all of these issues." Pet. App. 3. Citing *INS* v. *Bagamasbad*, 429 U.S. 24 (1976) (per curiam), the court observed that "[t]he BIA is not required to consider whether the threshold statutory eligibility requirements are met if it decides that the relief should be denied as a matter of discretion." The court went on to find that "[t]his is precisely what was done in this case." Pet. App. 3. The court accordingly limited its review to the Board's discretionary denial of adjustment of status under Section 245. Examining the record, the court concluded that the Board's findings had adequate support, and that there was no abuse of dis-

cretion in the Board's denial of petitioner's application for adjustment of status.

ARGUMENT

Petitioner contends (Pet. 5-7) that the court of appeals misapplied this Court's decision in *INS* v. *Bagamasbad*, 429 U.S. 24 (1976) (per curiam), by limiting its consideration to the denial of his application for adjustment of status under Section 245. Petitioner claims that the court should also have reviewed the Board's denial of his request for a waiver of inadmissibility under Section 212(i).

In *Bagamasbad*, this Court stated that "[a]s a general rule courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach." 429 U.S. at 25. The Court then applied that principle in the immigration context, holding that when an immigration judge denies an application for adjustment of status as a matter of discretion, there is no requirement that he also "arrive at purely advisory findings and conclusions as to statutory eligibility." *Id.* at 26. The principle articulated in *Bagamasbad* applies equally in this case.

Petitioner conceded that he is deportable because he was inadmissible; he then applied for a waiver of inadmissibility under Section 212(i) in conjunction with his application for an adjustment of status under Section 245. Although petitioner claims (Pet. 6) that his Section 212(i) waiver application was "entirely separate" from his adjustment-of-status application, that is not the case.[3] The purpose of the

[3] In passing, petitioner questions (Pet. 7) whether his past fraudulent acts constitute excludable conduct under Section 212(a)(19), 8 U.S.C. 1182(a)(19). His express admission

Section 212(i) application was to establish an express statutory requirement for adjustment of status, namely, that petitioner is admissible to the United States. 8 U.S.C. 1255(a)(2) (applicant must establish that he "is admissible to the United States for permanent residence"). Once the court of appeals determined that the Board had properly denied adjustment of status as a matter of its discretion—a conclusion petitioner does not dispute—it was unnecessary for the court to determine whether petitioner satisfied all of the statutory requirements for that relief.[4] *Bagamasbad*, 429 U.S. at 25-26.

Contrary to petitioner's contention, the court was not obligated to review the denial of the Section 212(i) waiver to preclude the possibility of an erroneous obstacle to petitioner's future entry to the United States. Petitioner surmises (Pet. 6-7) that the Board's comments on his statutory eligibility in the course of its discretionary denial of his application "will in all likelihood be accepted by the Amer-

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at his hearing that he was excludable under that provision, however, forecloses that claim.

[4] Even if the court had engaged in the gratuitous act of reviewing the Board's denial of discretionary relief under Section 212(i), it would not have aided petitioner. The Section 212(i) denial was based on virtually the same discretionary factors underlying the Board's denial of petitioner's application for an adjustment of status under Section 245. As to the latter denial, the court found that the record supported the Board's findings, that "the [Board] properly considered the countervailing equities weighing in [petitioner's] favor," and that the Board had not abused its discretion in "determin-[ing] that the adverse factors clearly were overriding." Pet. App. 4. There is no reason to believe that the court would have reached a different result under Section 212(i).

ican Consul when [he] applies for an immigrant visa." That claim resurrects an argument rejected in *Bagamasbad*. In that case, the court of appeals had "thought it advisable to require the making of eligibility findings * * * to foreclose the possibility that a United States consul to whom an alien might later apply for an immigration visa would mistakenly construe the immigration judge's exercise of discretion as a finding of statutory ineligibility binding on the consul." 429 U.S. at 26. The Court's response was to note that where the immigration judge's "action is discretionary, it will be clear to any United States consul that no eligibility determination has been made." *Ibid.* The Court explained that "[t]he consul will be free to give such findings as have been made their appropriate weight, if any, * * * and to make his own legal judgment on eligibility." 429 U.S. at 26-27. Just as in *Bagamasbad*, if petitioner makes a waiver request from abroad in conjunction with a visa application, the consul will be aware that a conclusive statutory determination on eligibility has not been made.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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